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# Supreme Court of the United States.

October Term, 1936.

No. 180.

**Holyoke Water Power Company,**
Petitioner,

v.

**American Writing Paper Company, Inc.,**
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

## BRIEF FOR THE AMERICAN WRITING PAPER COMPANY, INC., RESPONDENT.

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## INDEX.


| | Page |
|---|---|
| Opinions below | 1 |
| The jurisdiction | 2 |
| The questions presented | 2 |
| The statute involved | 3 |
| Summary of respondent's argument | 5 |
| Argument | |
| I. The Joint Resolution renders these rentals dischargeable dollar for dollar by the payment of $1500 | 9 |
| A. These are gold value clauses | 9 |
| B. The Joint Resolution is an integral part of the recent gold legislation | 11 |
| C. The Joint Resolution applies to all gold value clauses in obligations payable in money of the United States | 13 |
| 1. The Resolution applies to these rentals by its very terms | 13 |
| 2. Norman vs. Baltimore & Ohio Railroad Company is a binding precedent | 15 |
| D. Reply to objections | 18 |
| E. The Joint Resolution is constitutional as applied to these indentures | 22 |
| II. "The equivalent of this commodity in United States currency" is the $20.67 an ounce which has been paid | 24 |
| A. The rules applicable to the determination of the equivalent | 24 |
| B. The $35 per ounce | 26 |
| C. The equivalent is $20.67 an ounce | 29 |
| D. Perry vs. United States is a binding precedent for the determination of the equivalent at $20.67 an ounce | 32 |
| Appendix | 39 |

## AUTHORITIES CITED.


| | Page |
|---|---|
| Emery Bird Thayer Drygoods Company et al. vs. Williams et als., 15 Fed. Supp. 938 | 28 |
| Hicks vs. Guinness, 269 U.S. 71 | 24, 26 |
| Norman vs. Baltimore & Ohio R. Co., 294 U.S. 240 | 7, 12, 15, 16, 17, 18, 22, 35 |
| Nortz vs. United States, 294 U.S. 328 | 22 |
| Pennsylvania R.R. Co. vs. International Coal Co., 230 U.S. 184 | 19 |
| Perry vs. United States, 294 U.S. 358 | 8, 17, 24, 26, 28, 29, 32, 33, 34 |
| Emergency Banking Act of March 9, 1933 | 11, 13 |
| Gold Reserve Act of 1933 | 8 |
| Gold Reserve Act of 1934 | 12, 16, 30, 31, 32, 34, 39 |
| H.R. No. 169, 73d Congress, 1st Session | 23 |
| Joint Resolution of June 5, 1933 | 2 et seq. |
| Legal Tender Act of 1862 | 11 |
| Treasury Regulations, Article III, section 23 | 41 |
| Treasury Regulations, Article VI, section 4 | 34, 40 |
| Treasury Regulations, Article VI, section 35 | 39, 40 |
| Treasury Regulations, Article VI, section 39 | 41 |
| Treasury Regulations, Article VI, section 40 | 41 |
| Treasury Regulations, Article VI, section 42 | 28, 30, 39 |
| 77 Cong. Record, 4529, 4893 | 20 |
| Black's Law Dictionary | 15 |
| Century Dictionary | 15 |
| Hardy, Charles O., "The Warren-Pearson Price Theory," 1935, Brookings Institution, p. 34 | 36 |
| Harris, S. E., "Exchange Depreciation," 1936, Harvard University Press, p. 255 | 37 |
| Webster's Dictionary | 15 |

In the

# Supreme Court of the United States.

October Term, 1936.

No. 180.

HOLYOKE WATER POWER COMPANY, Petitioner,

*vs.*

AMERICAN WRITING PAPER COMPANY, INC., Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

## BRIEF FOR THE AMERICAN WRITING PAPER COMPANY, INC., RESPONDENT.

### Opinions Below.

The opinion of the District Court of Massachusetts, reprinted in full in Record 104-111, is reported in 11 Fed. Supp. 518 (July 2, 1935); that of the Circuit Court of Appeals for the First Circuit, likewise reprinted in full in Record 124-134, is reported in 83 Fed. (2d) 398 (April 15, 1936).

The opinion of the District Court in the previous case between the same parties on the same indentures may also be referred to. It is reported in 9 Fed. Supp. 451 (January 2, 1935).

## The Jurisdiction.

A writ of certiorari issued from this Court to the Circuit Court of Appeals for the First Circuit on October 12, 1936, on the petition of the Holyoke Water Power Company. The jurisdiction of this Court rests upon section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## The Questions Presented.

The issue is the amount of rentals payable under certain indentures of lease or grant from the Holyoke Water Power Company, the petitioner here, to the predecessors in title of the American Writing Paper Company, Inc., the respondent, of land and water rights in Holyoke, Massachusetts.

These indentures were executed in Holyoke between 1880 and 1898, and they provide for the payment of rentals in Holyoke in the following typical form:

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency."

The petitioner, Holyoke Water Power Company, claims that the rentals due July 1, 1934, October 1, 1934, and January 1, 1935 under this provision amounted to $2539.69, which is at the rate of $35 per ounce of pure gold.

The respondent, American Writing Paper Company, Inc., paid $1500 in currency, contending that these rentals were dischargeable dollar for dollar under the Joint Resolution of Congress of June 5, 1933, or, which comes to the same thing, that the "equivalent" is to be paid, not at the rate of $35 an ounce, but at the rate of $20.67.

This issue involves the following questions:

Does the Joint Resolution of June 5, 1933, render these rentals dischargeable dollar for dollar?

Is the Joint Resolution so applied and so operative constitutional?

Does "the equivalent" amount to $20.67 per ounce or to $35 per ounce of gold?

Does the devaluation of the dollar entitle the petitioner to anything more than $20.67 per ounce?

## The Statute Involved.

THE JOINT RESOLUTION OF CONGRESS.

*To assure uniform value to the coins and currencies of the United States.*

*June 5, 1933.*

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) every provision contained in or made with respect

to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

§ 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) hereto-

fore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p.m.

**Summary of Respondent's Argument.**

The rental provisions in these indentures are not really commodity contracts. They do not require the obligor to deliver a commodity. They are gold value contracts, because they provide for payment either in gold or in the equivalent of gold in currency *at the option of the obligor*. Since the performance of either alternative is a full performance of the contract, the contract may be fully satisfied by the payment of money without the delivery of a single ounce of any commodity at any time. If this were a commodity contract, the money payment would be damages for the breach of a contract to deliver the gold, not, as it is, the performance of the contract in accordance with its very terms. Plainly it imposes no obligation upon the obligor to deliver gold as a commodity or otherwise. The obligation is to deliver the *value* of gold, either by the delivery of the gold itself or of its equivalent in money. Simply calling the measure of the equivalent money a commodity does not make the contract a commodity contract.

We have, therefore, not a gold contract but a *gold value* contract.

The recent gold legislation of 1933-1934, which must be taken as a legislative unit, and of which the Joint Resolution of 1933 was only one part, did two things: (1) It eliminated the alternative of gold by making it impossible to pay in gold; and (2) it rendered the remaining alternative

of money dischargeable dollar for dollar. For that was an obligation to pay an amount of money measured by gold, and expressly covered by the Joint Resolution. Congress banned gold as well as gold coins, and took action to put *all* gold value contracts on a uniform basis of parity.

The Joint Resolution declares to be against public policy any obligation purporting "to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby." This language embraces the present contract, since it expressly calls for gold or an amount of currency measured thereby. Under the terms of the Resolution, therefore, this contract is dischargeable dollar for dollar in currency.

The petitioner contends that the Joint Resolution was not intended to apply to the present contract because the formula prescribed for the discharge of contracts *i.e.*, by payment "dollar for dollar" is not adapted to a contract which refers to dollars only for the purpose of fixing a quantity of gold which, in turn, is to be taken as the measure of payment in currency. The petitioner argues that the reference to dollars in this indenture was merely incidental and fortuitous; that the parties could have achieved the same result by providing for a certain number of ounces of gold with no mention of dollars whatever; and that a formula discharging the contract "dollar for dollar" does not apply where the contract contained no reference at all to dollars.

This argument is based on a practical inconvenience which does not exist in this case. For here there is an express reference to a fixed amount of dollars and here there is no difficulty whatever in applying the formula for discharge "dollar for dollar." Moreover, the petitioner's argument, if accepted, would confine the Resolution to contracts calling for a particular kind of coin or currency, or

their equivalent, and would read out of the Resolution entirely the provision which prohibits contracts requiring "payment in *gold* . . . or in an amount in money . . . measured thereby." This provision must mean that the Resolution was intended to apply, not only to contracts which provide for the payment of currency in the equivalent of *gold coin*, but also to contracts, like the present, providing for payment of currency in the equivalent of *gold*.

What we have here is an express gold value clause. It is what the gold clause in *Norman* vs. *Baltimore & Ohio R. Co.* was construed to be. What was there implied by the parties and construed by the Court is here expressed by the parties. The decision in that case is decisive here.

As the Joint Resolution was held constitutional in the *Norman* case, so it is constitutional here as applied to these rental clauses. The monetary power of Congress extends over money contracts measured in terms of gold as well as over contracts for gold coin. Whether it would extend to contracts attempting to make other commodities the measure of money is beside the point. Gold has been used as money and as the measure of money too long to relieve it of the public burden of regulation by Congress.

Nor is the Joint Resolution as applied to these rental clauses invalid because there may be so few of them that they alone might not reasonably be regarded as an obstacle to the effective exercise of Congressional power. That is not the point. The point is whether they are to be made an exception to an exercise of that power which expressly includes them. Congress, by this Joint Resolution, expressly included obligations to pay an amount of money measured by gold as well as obligations to pay gold coin. There is no reasonable ground for singling them out as an exception. To single them out would strike at the very reason for giving the power to Congress, which was uniformity. Moreover, if they and such as they were exempted, the exception

would soon become the rule, as the only way men would have to fix promised money values in terms of gold.

But, even if the Joint Resolution cannot be applied to these rental clauses, whether as inapplicable or as invalid if so applied—even if there had been no Joint Resolution, yet the equivalent in money which these indentures call for is at the rate of $20.67 per ounce of gold. This result is reached quite independently of the Resolution. The usual doctrines of the law of contracts, applied to the situation created by the impossibility of paying in gold, require it.

The measure of the equivalent of the gold in money is what the gold would have been worth to the petitioner if it had been paid. That is what the petitioner contracted for with the word "equivalent." It cannot mean more than that without belying its own name.

An examination of the relevant Treasury Regulations shows that, if the gold had been paid, the petitioner could have got for it $20.67 per ounce, not $35 per ounce or any other sum.

The reduction of the gold content of the dollar by the Gold Reserve Act of 1933 and the Presidential Proclamation made no difference to that result. Devaluation made the gold worth no more to the petitioner. It could have got no more dollars for such gold after the devaluation than before.

This is the same result we reach by applying the Joint Resolution, and it is just the result we should expect from the fact that the Gold Reserve Act, the Presidential Proclamation, the Treasury Regulations, and the Joint Resolution are all of them parts of one whole, all directed to the same end.

*Perry* vs. *United States* held that this was so for gold coin, and there is no reason to give more for gold bullion

than for gold coin. The determination of the equivalent in that case is decisive of its determination here at $20.67 per ounce.

The petitioner has shown no loss to it here, any more than Perry in that case showed any loss to him there. We have only the certainty that the respondent is being asked to pay 69 cents a dollar more than it has been paying—a gratuitous loss to it and a windfall to the petitioner.

## Argument.

### I.

### THE JOINT RESOLUTION RENDERS THESE RENTALS DISCHARGEABLE DOLLAR FOR DOLLAR BY THE PAYMENT OF $1500.

#### A. These Are Gold Value Clauses.

The indentures provide for the payment of rentals in "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency."

It seems clear enough that the parties were measuring their rentals by the value of gold.

Not gold, but the value of gold. Or else the Power Company would not have left the option of paying the equivalent in currency to its debtors, as it did. That option was in the hands of the obligor, and thereby these rental provisions became gold value contracts, not gold commodity contracts. A contract under which the obligor, not the obligee, has a right to decide upon the delivery of a commodity can scarcely be called a commodity contract. The Power Company did not want, nor did it intend to get, gold, not even in order to hoard it. For it made no attempt to require its grantees to deliver gold to it. These indentures

impose no obligation on the obligor to deliver gold, as a commodity or otherwise. The obligation is to pay the *value of gold*, either by the delivery of the gold itself or by the payment of its equivalent in money. Gold is the measure of the money equivalent.

It makes no odds that the measure of the value is referred to as a commodity. A contract becomes a commodity contract by reason of the thing contracted for. It does not become a commodity contract because the thing contracted for is measured by a commodity. You cannot make it a commodity contract simply by calling the measure of the thing contracted for a commodity.

The payment of the "equivalent of this commodity in United States currency" is a full performance of the obligation. If this were a commodity contract, payment of the equivalent would be damages for the failure to deliver the gold, not a performance of the contract in strict accordance with its very terms. This is not a suit for damages for the breach of a contract to deliver a commodity. It is a proceeding for the determination of the proper amount of a claim under the indentures.

Moreover, we must consider the character of the gold to be delivered if the obligor elects the first alternative of performance. The gold called for is gold of the fineness, as well as the weight, of the gold coin of the United States. The indentures say that it is to be "equal in amount to [so many] dollars of the gold coin of the United States of the standard of weight and *fineness* of the year [so and so]." *

That is coin gold. So even this alternative was performable, in strict accord with its express terms, and most conveniently, by the payment of so many gold coins.

However, the point is not important, coin gold or gold coin. For, so far as the petitioner is concerned, either is

* Respondent's 5th request (R. 101) was granted (R. 103), and the Circuit Court of Appeals agreed (R. 125, bottom).

really but the measure of the value of the equivalent, and there is no difference between so many ounces of coin gold and the same number of ounces of gold coin when each is only a measure of the value of the equivalent in United States currency, which the obligor had the option to pay.

Such were the rental obligations of these indentures until the recent gold legislation of 1933 and 1934.

B. The Joint Resolution is an Integral Part of the Recent Gold Legislation.

Until the Legal Tender Act of 1862, the only legal tender in the United States was gold and silver. Throughout the greenback period, and until March, 1933, gold as well as silver remained both legally and actually in circulation.

On March 6, 1933, the President declared the Bank Holiday, and on March 9, 1933, Congress empowered the President to "investigate, regulate, or prohibit . . . [the] export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States . . . ," and at the same time authorized the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States "any and all gold coins, gold bullion, and gold certificates." By Executive Orders and Treasury Regulations these powers and authorities were exercised and the purpose of Congress carried into effect.

Thereby gold, *in bullion as well as in coin,* for the first time was banned and passed out of circulation, both legally and actually.

That was the background for the Joint Resolution of June 5, 1933, which declared every obligation, payable in money of the United States, which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency or in an amount in money of the

United States measured thereby, to be against public policy and dischargeable dollar for dollar in any legal tender.

In the course of the summer and fall there followed further and more detailed Executive Orders and Treasury Regulations on the subject which in substance forbade any monetary use of gold.

Then, on January 30, 1934, five months before the first of the rentals in this case came due, Congress passed the Gold Reserve Act of 1934. The next day the President reduced the gold content of the dollar, and at the same time the Secretary of the Treasury made new Regulations regulating all uses, and maintaining the prohibitions against any monetary use, of gold.

It would be tedious as well as unnecessary to set forth these measures in any further detail. They were fully expounded to this Court, and this Court has itself given their substance and their effect in its opinion in *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, at 295-297.

One point, however, should be emphasized. It is contained in the statement with which this part of the opinion opens and closes.

It begins:

> "The Joint Resolution of June 5, 1933 was one of a series of measures relating to the currency. These measures . . ."

It ends:

> "The Resolution must, however, be considered in its legislative setting and in the light of other measures *in pari materia.*"

This legislation, all of it, must be regarded as a whole, of which the Joint Resolution is an integral part.

C. The Joint Resolution Applies to All Gold Value Clauses in Obligations Payable in Money of the United States.

*1. The Resolution Applies to These Rentals by its Very Terms.*

The first and immediate effect of this legislation was to eliminate any option as to the method of payment. After the Bank Holiday, in early March of 1933, it became impossible to make any payments or deliveries of gold, whether in coin or in bullion. It was impossible in fact, because the Orders made by the President and the Secretary of the Treasury under the authority of the Emergency Banking Act of March 9, 1933, were being enforced. It was impossible in law under the terms of those Orders and that Act.

The first alternative method of payment was, therefore, effectively eliminated from the indentures. The obligation was reduced to an obligation under which the obligee had a right to require payment of the equivalent of that now impossible gold in United States currency.

That is an obligation which falls pat under the provisions of the Joint Resolution. For what is that but an obligation which purports to give the obligee a right to require payment in an amount in money of the United States measured by gold, payable in money of the United States? That is the obligee's right, and the only right it had, and under the Joint Resolution it became dischargeable dollar for dollar. This was the conclusion of the Circuit Court of Appeals (see R. 134).

We submit, however, that these indentures have always been such gold value contracts as are declared against public policy and made dischargeable dollar for dollar by the Joint Resolution.

Our obligation is a combination of two obligations in the alternative, of which the first calls for the delivery of a stated quantity of gold and the second calls for the payment of its equivalent in currency. This is precisely what the Resolution expressly covers, that is, an—

> "obligation which purports to give the obligee a right to require payment in gold . . . or in an amount in money of the United States measured thereby"—

which at the same time is "payable in money of the United States." In other words, the obligation in our indentures meets all the conditions of the Resolution. Its first alternative purports to give the obligee a right to gold, and its second calls for an amount in money measured by the gold, *i.e.*, makes it payable in money.

Is it any objection that the Resolution did not contemplate obligations in the alternative, but different sorts of obligations? It may well be that the Resolution was intended to cover these several kinds of obligations one at a time, so to speak. Yet the comparison is not the less valid. For the two which are contained in our indentures are both covered by the Resolution. Let the obligor turn from one of its alternatives to the other, and thereby give the obligee a right to require first one, then the other; yet the obligation remains within the Resolution. The obligation, however the obligor may choose, is one that purports to give the obligee a right to require payment in a manner prohibited. The obligation cannot be performed without doing what the Resolution declares to be against public policy, and, as we have seen, either form of performance is dischargeable dollar for dollar.

Judge McLellan suggested that the fact that the obligation could be performed without the payment of money would prevent the Resolution from applying before that

possibility had been eliminated (9 Fed. Supp. at 453). But the provision of the Resolution which requires the obligation to be "payable in money of the United States" does not mean that it *must* be so payable and *only* so payable. It is enough that they *may* be so payable according to their terms.

If we have recourse to dictionary definitions of the word "payable," we find that Webster gives: "That may, can, or should be paid; justly due"; the Century Dictionary says: "1. That can be paid, or is to be paid; capable of being paid; 2. To be paid; due: as, bills payable"; and Black's Law Dictionary: "Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."

*2. Norman vs. Baltimore & Ohio Railroad Company is a Binding Precedent.*

The Circuit Court of Appeals accepted the decision of this Court in *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, as a binding precedent (R. 130-131).

The bonds in that case had the usual gold coin clauses, but they were construed and treated as gold value contracts.

The obligor argued that the obligation was one for the payment of money, "a gold coin and not a gold value clause; that is, it does not imply a payment in the equivalent of gold in case performance by payment in gold coin is impossible" (p. 298). He argued that the parties intended that the bonds should be negotiable, and hence that it should not be regarded as one for the payment of an indeterminate sum ascertainable only at date of payment.

The bondholder, on the other hand, opposed that interpretation as inadequate and unreasonable. He insisted "that the words of the gold clause clearly show an intent 'to establish a measure or standard of value of the money to be

paid if the particular kind of money specified in the clause should not be in circulation at the time of payment' " (p. 299) and that to deny his right to the equivalent would be a nullification of the clause.

This Court ruled in favor of the bondholder. On page 302 this Court, rejecting the interpretation that the gold clauses then before it were contracts for the payment of gold coin as a commodity or in bullion, said that they were contracts for the payment of money, and added:

> "We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

Further along in the opinion (p. 313) it is said:

> "It is apparent that if these promises *were to be* taken literally, as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin." (Our italics.)

Then, on the next page (p. 314), comes the sentence quoted and relied on by the Circuit Court of Appeals (R. 130):

> "But, if the clauses *are* treated as 'gold value' clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition."

In brief, the Court said that they were neither commodity contracts nor pure money contracts, but *gold value con-*

*tracts.* And this is how Mr. Justice Stone in his concurring opinion in *Perry* vs. *United States,* 294 U.S. beginning at 358, understood that the Court had taken them. He said, on page 360:

> "Moreover, *if the gold clause be viewed as a gold value contract, as it is in Norman* vs. *Baltimore & Ohio R. Co.,* supra, it is to be noted that the Government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery."

The rental provisions in our indentures simply spell out what was implied in the Baltimore & Ohio bonds in the *Norman* case and what this Court construed them to mean.

Those bonds provided for the payment of a specific number of dollars in gold coin. That is an ambiguous combination of two essentially different things—the two different values in gold coin. One is the statutory value ascribed to gold coin by Act of Congress which established it as legal tender. This value does not depend upon the material out of which it is made. It results solely from the statutory declaration. The other value of a gold coin is the commodity value of the quantity of the precious metal contained in it. This does not depend upon the fact that the gold is coined. It results solely from the fact that it is a precious metal.

This Court recognized that such clauses were intended for protection against a depreciation of the currency, and said that, by calling for a specified number of dollars in gold coin, the parties intended, not merely the statutory value, but the value of the gold itself. This gold value is nothing more nor less than what we have here—an equiv-

alent in money of the quantity of gold equal in amount to the specified number of the gold coins. That is precisely what our indentures call for.

There is, we submit, no distinction to be drawn, so far as the Joint Resolution is concerned, between the bonds before the Court in the *Norman* case and these indentures.

### D. Reply to Objections.

(1) The petitioner says that the Resolution does not provide for the discharge of the first alternative of the obligation which permits payment in a quantity of gold. We do not agree to that, because the quantity of gold is measured by gold coin, but even if we did, the question is academic, because this first alternative does not stand alone. It was coupled with the other alternative. This was never simply a contract to pay gold. It was a contract to pay gold-or-its-equivalent, which later became, by operation of an impossibility created by law, a contract to pay the equivalent of the gold.

(2) The petitioner contends that the parties did not intend that the equivalent should be discharged at the face value of its measure, notwithstanding a depreciation of the dollar, and refers to the bonds in the *Norman* case, which, as this Court has stated, were intended to afford a definite measure of value, and to protect the parties against depreciation and against their discharge by a payment of less value (Petitioner's Brief, pp. 18-20). But whatever the intention of the parties, if it runs counter to the Resolution, it does not prevent the Resolution from applying. The purpose of the Resolution was the overriding and defeat of just such intentions. All gold obligations were to go on the same basis, notwithstanding the intention of the parties.

(3) The petitioner argues that the Joint Resolution only applies to obligations based upon gold coin, and not to obligations based simply on gold. But in both the preamble

and in section (a) of the Resolution, the prohibition is extended to contracts purporting to require "payment in gold or a particular kind of coin or currency . . ." or in money measured thereby. To say that the word "gold" means nothing more than *gold coin*—to make an adjective out of it—twists it into a mere tautology, because obligations based on gold coin are directly covered by the language of the very next provision: "a particular kind of coin or currency." If Congress had intended the Resolution to include only obligations based upon *coin*, the express reference to contracts payable simply "in gold" could have been, and would have been, omitted.

If the Resolution be confined to gold coin, it will be the only part of the recent gold legislation that is. All the rest, of which it is only a part, covers bullion as well as coin. The Resolution is part of the apparel in which Congress clothed its policy, and if it covers only gold coin, it will be like a shirt that comes short.

If obligations measured by gold bullion are not covered by the Resolution, it draws a distinction where no substantial difference exists, between one kind of gold value clause and another. Men could contract for values measured in gold simply. They would be prohibited only from contracting for values measured in gold that had been coined. The Resolution would become as easy to evade as it is for a lawyer to draw a new instrument.

The petitioner relies on the legislative history of the Resolution and the debates in Congress to show that the legislators had only gold coin contracts in mind when the Resolution was passed. Without discussing the relevancy of debates in Congress as bearing upon the present question (see *Pennsylvania R.R. Co.* vs. *International Coal Co.*, 230 U.S. 184, 198-199), it is sufficient to say that they do not support the petitioner. They show, perhaps, that gold coin bonds were the obligations which were most talked

about, a result only natural in view of their great number and importance. But these debates are far from showing an affirmative intent to limit the legislation to that particular form of contract or to exclude from the Resolution other types of *gold value* contracts. It serves no purpose to show that ordinary commodity contracts were intended to be excluded, for the Resolution itself so provides by restricting its operation to obligations "payable in money . . ." We are not concerned with such a contract here.

The volume and importance of gold coin contracts showed the need and provided the occasion for legislation which was intended to cover the *entire field* of gold value contracts. All gold value contracts were intended to be put upon the same basis, because gold formed the basis of the nation's currency. Both Congressman Steagall, who was in charge of the Resolution on the floor of the House, and Senator Fletcher, who presented it to the Senate as chairman of the Committee on Banking and Currency, made the following statement. It is the same, word for word. Evidently both were reading a prepared statement. Both of them said:

> "If in the exercise of its expressed powers to borrow money and to coin money and regulate its value, the Congress finds that *provisions which purport to give to the obligee a right to require payment in gold—the basis of the Nation's currency—or in any particular kind of money or in an amount in money measured thereby,* obstruct the power of Congress to regulate the value of money and are inconsistent with the declared policy of Congress to maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts, the Supreme Court will accept such findings" (77 Cong. Record, 4529 and 4893). (Italics ours.)

(4) Another objection is based upon an asserted difficulty in fitting the dollar-for-dollar provision of the Joint Resolution to the amounts of gold in the indentures.

But the equivalent of "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894" was intended to be discharged dollar for dollar of the amount stated. The Power Company, during all these years, must have been receiving in discharge of these rentals precisely that sum, dollar for dollar, a dollar in currency as the equivalent of the quantity of gold equal in amount to the $1500 in gold coin. That was the equivalent, and it was dollar for dollar. It is a little absurd for it now to say that the language of their contract is not adapted or susceptible to such payment or that it cannot be done without doing violence to the intention of the parties. If any violence has been done to that intention, it has been done by virtue of the operation of the Joint Resolution, not by the Court which applied it.

If these rental clauses fall under the Resolution's declaration of public policy, and yet are not at the same time rendered dischargeable dollar for dollar, what is their status?

Is it possible that these indentures are simply unenforceable? It would be absurd to suggest that the petitioner's claim should be denied *in toto* as contrary to public policy.

Congress must surely have intended that its provision for a dollar for dollar discharge should be coterminous with its declaration of policy and its prohibition.

Take an obligation to pay so many grains or ounces of pure gold or its equivalent in money, which is what the petitioner says we really have here. It is not difficult to divide the number of ounces by 25.8 grains, the number in the old gold dollar, and thereby find the number of dollars with which to discharge the obligation. It is as easy as

dividing by 15 5/21 grains, which the petitioner would have us do to discharge the obligation in new dollars. Indeed, the petitioner in effect admits that its rentals are dischargeable dollar for dollar when it urges that they should be discharged in new dollars instead of old. For it contends that the specified quantity of gold should be commuted into new dollars instead of old dollars, dividing by 15 5/21 grains instead of by 25.8. See petitioner's brief, pp. 17 *et seq.*, specially 30-31.

### E. The Joint Resolution is Constitutional as Applied to These Indentures.

These are gold value clauses, and gold value clauses are subject to the sovereignty of the monetary policy of Congress. *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 311-316.

We are not going to reargue that case. We submit it as a binding precedent. Congress has the same power over contracts written for the value of gold bullion as it has over contracts written for the value of gold coin. If Congress may call in and appropriate gold bullion as well as gold coin (*Nortz* vs. *United States*, 294 U.S. at 328), Congress may abrogate contracts for the equivalent of the bullion as well as for the equivalent of the coin. Congress has the power to put the country on a gold bullion instead of a gold coin basis. The one as well as the other is an allowable variant of a gold standard.

But, it is suggested, the reason why the gold value clauses in question in the *Norman* case could constitutionally be abrogated was the great volume of them—seventy-five billions of them. In the words of the report of the House Committee on the Joint Resolution, "If the gold clause applied to a very limited number of contracts and securities, it would be a matter of no particular conse-

quence" (H.R. No. 169, 73d Congress, 1st Session). And it is said, without proof, there are but few such contracts as these. Therefore the petitioner argues that provisions of the kind found in these indentures cannot be held to interfere with the constitutional power vested in Congress to regulate the currency, and hence that the Joint Resolution applied here deprives it of its property without due process of law and is beyond the delegated power.

If Congress had singled out only such provisions as we find in these indentures and abrogated only these, the respondent might have argued that it was an unreasonable classification and an arbitrary act. For there is no reason to make them an exception. In the interest of uniformity, if nothing more, such contracts as these not only might be, but should be, included in the congressional prohibition. The policy of Congress was to include all gold value clauses of every kind. Congress had power to include all of every kind. The hypothesis, that Congress had no power to single out one particular kind which might be few in number, too few to interfere with its policy of monetary regulation, is certainly no basis for the petitioner to argue that Congress has made an exception of that particular kind. The proposition that Congress could not have abrogated only such contracts as these is no reason for denying Congress the power of including them in its exercise of power.

If the Court should make these indentures and such as these an exception, because there may be too few of them now to interfere with the present policy of Congress, it is probable that they would become the rule simply by reason of the fact that they have been made the exception. If such gold value clauses as are contained in these indentures were exempted and excluded from the power of Congress to prevent interferences with its monetary policy, they will be taken up, developed, and become the usual medium by which men seek to stabilize money values in terms of gold.

## II.

## "THE EQUIVALENT OF THIS COMMODITY IN UNITED STATES CURRENCY" IS THE $20.67 AN OUNCE WHICH HAS BEEN PAID.

Even if the Joint Resolution be held not to render these rentals dischargeable dollar for dollar, whether because it is inapplicable, or, though applicable, because, so applied, it is unconstitutional, the judgment of the Circuit Court of Appeals must still be affirmed. For, even if there were no Joint Resolution, the decree of the District Court is effectively supported on its own ground, that the equivalent equals $20.67 per ounce of fine gold.

### A. The Rules Applicable to the Determination of the Equivalent.

As we have already said, this "equivalent" is a payment provided by the obligation itself. It is not a compensation in damages for a breach of the obligation provided by the law. But both are measurable on the same principles.

The equivalent would be that amount of currency which would leave the creditor, the petitioner, as well off in currency as it would have been had it received the stipulated quantity of gold. In *Perry* vs. *United States,* 294 U.S. 330, at 357, this Court said:

> "Plaintiff demands the 'equivalent' in currency of the gold coin promised. But 'equivalent' cannot mean more than *the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used.*" (Our italics.)

That is, of course, the same thing as damages. In the words of this Court in *Hicks* vs. *Guinness,* 269 U.S. 71, at

80, which was an action brought for a debt due in the United States payable in German marks:

> "The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is 'the loss of *what the contractor would have had if the contract had been performed.*'" (Our italics.)

The indentures call for gold delivered in Holyoke. The value of gold elsewhere, say at the nearest available market, is relevant only to determine the value in Holyoke, only as evidence of its value on that spot, with shipping charges added, on the assumption that it could be shipped to Holyoke. When that is impossible, the evidence is irrelevant. The impossibility of delivering the commodity at the time and place covenanted does not permit one of the contracting parties to force the other into the accord and satisfaction of delivery elsewhere.

The assumption which we must make is the delivery of gold at the time and place promised, and not in any other place or at any other time. As the District Court said (R. 107):

> "The contracts were to be performed in Holyoke, and the debtor was under no obligation either to perform the contract in London or any other foreign market or to import gold for the purpose of selling it to the United States mints and turning the proceeds over to the petitioner."

The equivalent is not the price which the parties could have obtained if they had bought gold in London, imported it, and sold it to a mint (Errors Assigned; R. 112). That is based upon the mistaken principle that the equivalent is to be determined, not by what the petitioner could have obtained for the gold if it had been delivered or what the gold

would have been worth to the petitioner, but by what it would have cost the parties to deliver the gold in London or "at the nearest accessible point to Holyoke." The correct rule, whether for the determination of the equivalent or for its measurement as if it were damages, is that set forth by this Court on that score in the *Perry* case and in *Hicks* vs. *Guinness*. It is the value of gold *in Holyoke* which determines this question. It is what the gold delivered *there* would be worth to the *petitioner*. It is not what it would cost the *respondent* to deliver it *anywhere else*."

B. The $35 per Ounce.

The petitioner argues that the equivalent must be determined by the number of dollars into which the specified quantity of gold could hypothetically have been coined. Its contention is that the quantity of gold specified should be commuted into gold coin and that the equivalent equals one dollar in currency for every such dollar in gold coin.

This is inconsistent with the petitioner's argument against the application of the Joint Resolution. There it asserts that the mention of the gold coin in the indentures serves merely the function of describing, once for all, a quantity of gold bullion which might as well have been expressed in ounces or grains (petitioner's brief, p. 36). And bullion, it argues, does not come within the Resolution. But here, when it comes to determine the equivalent, it argues that the only significance of the bullion is the amount of gold coin that it could be coined into. The bullion, instead of being simply bullion, becomes potential gold coin. We are back to the gold coin which had described it.

Moreover, if this is the way to determine the equivalent, the petitioner must concede that the Joint Resolution applies. For then the rentals will call for a number of dollars in currency, which shall be equal to a number of gold

dollars, which in turn is to be measured and determined according to the weight and fineness prescribed by Congress for gold coin. That is surely an obligation which is payable in money. It requires payment in an amount in money measured, not by the value of gold, but by gold coin, the more definitely so because the measure of the money is the mint price of the gold coin instead of its market price. And it is obviously capable of being discharged dollar for dollar. Thus, our rental clauses, construed as the petitioner contends they should be construed for the determination of the equivalent, are obligations which are included in the Joint Resolution, on the petitioner's own construction of the Resolution as restricted to gold coin. Hence our rentals must be discharged upon payment in currency, dollar for dollar; and the basis must be a dollar of the particular gold coin specified.

So we turn to the position which the petitioner took in its petition and at the trial, that the equivalent meant the market or commodity value of the quantity of gold specified. Its claim for a price of $35 was based upon what it asserted was obtainable for gold from the Government (R. 5-7). There was no other market.

The question is whether the petitioner could legally have obtained $35 an ounce from the Treasury on July 1, 1934, October 1, 1934, and January 1, 1935, for gold paid it as rentals under these indentures on those dates by the respondent in Holyoke, which is when and where these rentals were payable. And inasmuch as the prohibitions and restrictions under which gold has been placed depend upon its use, this question is not: What price any gold? It is: What price this gold; that is, gold used in payment of these rentals, under these indentures? Gold to be used in the arts and industries, for jewelry, etc., or for gold newly mined and shipped directly to the mint, or for gold imported and trucked directly to the Treasury, is not such

gold as can be regarded as available for these payments, and its value is not available for the purpose of determining the equivalent of the gold which these indentures use as the measure of that equivalent. Yet that is the only gold which the Treasury would buy at $35 an ounce. Detailed proof of this is given in an appendix.

Therefore, we conclude: The price of $35 an ounce provided in section 42 of these Provisional Regulations is not a criterion of the equivalent of gold under our indentures, and does not furnish any relevant evidence as to the price of gold by which that equivalent may be determined. For no mint is authorized by these Regulations to offer $35 for any gold which has been, or which we can assume to have been, used for such a purpose as paying our rentals. As this Court said in the *Perry* case (294 U.S. at 357):

> "In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to *assume* that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange or *for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation.*" (Our italics.)

A District Court has recently ignored this. In *Emery Bird Thayer Drygoods Company et al.* vs. *Williams et als.*, 15 Fed. Supp. 938, a lease reserved a rental of 139,320 grains of pure gold on each quarter-day, provided, however, that the lessors might at their option require, in lieu of any such quarter-yearly delivery of pure unalloyed gold, the payment of $6000 in such lawful currency as the lessors might designate.*

* Since the option lay with the lessors, the rental was payable only in the gold, and not in money, unless they exercised their option, which they did not do.

The court held that the equivalent in value of the 139,320 grains of gold was $10,158.76 in currency, at the rate of $35 an ounce, as for newly mined gold, saying: "The *assumption* here must be that *lawfully* there has been delivered to the lessors and that *lawfully* they have the stipulated quantity of gold" (footnote to p. 945). (Italics ours.)

No, the impossibility which made any assumption necessary is not simply that it was impossible *in fact* to deliver the gold. It was a *legal* impossibility which prevented the delivery of the gold. Even if it had been possible *in fact* for the lessee to hold any gold that had been delivered, it would have been impossible *in law*. The assumption on which the equivalent is to be fixed must be the same as the circumstances which made it necessary. It is not logically proper to shift premises. It is not proper to say: Had the gold been delivered, it would have been *lawfully* worth so much, when the reason why it was not delivered was that it was *unlawful*. Yet the court made the lessee pay on the assumption that he could have lawfully delivered the gold, when we know he could not. It gave the lessor more than it knew he could lawfully have turned the gold in for. What the court was really assuming was that both the lessor and the lessee had violated the Regulations.

It was just such a false assumption that this Court warned against in the *Perry* case (294 U.S. 330, at 357), in the quotation we have just given above.

### C. The Equivalent is $20.67 an Ounce.

The only relevant evidence, we submit, of the value of gold was the price obtainable from the Government at $20.67 an ounce, fixed by the Order of the Treasury of January 15, 1934 (Debtor's Exhibit A, which appears in the Record, at page 81). It fixes January 17th as the last

day for the surrender of gold coin, gold bullion, or gold certificates, and instructs the fiscal agents of the United States in respect to gold thereafter surrendered to "pay for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion $20.67 an ounce."

It is still in force, and was in force on the dates when the rentals here in issue became due. It was not affected or modified by the devaluation of the dollar under the Gold Reserve Act of 1934. The Secretary of the Treasury so stated expressly in telegrams to the Governors of Federal Reserve Banks on February 1, 1934, and again on February 7, 1934, which appear in the Record, on pages 83 and 84.

The result is, as Judge Brewster ruled:

> "Any gold bullion received on account of rentals falling due in July or October 1934, or January 1935, would be held by the petitioners in non-compliance with the orders, and the only opportunity open to it would be to surrender it and to receive $20.67 an ounce. In no market could it obtain a better price" (R. 110, at bottom of page).

It does not matter how much or how little gold has been or is being bought by the Treasury at this price. The amount is irrelevant. The point is that $35 would not have been available, and that only $20.67 would have been available.

It is true that the Secretary of the Treasury reserved the right to change this price at any time. So, likewise, he expressly reserves the right to change the price of $35 (see section 42 of the Regulations; R. 59).

It is also true that the Secretary of the Treasury reserves his rights to collect any penalty which may be due for non-compliance with the law. That is simply part of the cause for the impossibility of paying in gold. The payment in gold was impossible because it was forbidden, and forbidden

under a penalty. This does not change the fundamental and solely relevant fact that, if the gold had been paid, all the petitioner could have got for it, and hence all it could have been worth to the petitioner, was $20.67 an ounce.

Thus it will be seen that the Treasury Regulations and the Joint Resolution have the common purpose of depriving gold of all monetary use. All the gold in the country is to be surrendered to the Treasury, excepting only gold in the arts and industries, and such as might safely be neglected, *i.e.*, fabricated, scraps up to 5 ounces, nuggets, rare coins, etc. In order to effect this surrender the Treasury offers to buy all *new* gold, newly mined or newly imported, and so potentially able to enter the monetary life of the country, either up from the ground or in over the frontier, and will pay $35 an ounce for it. This price applies only to *new* gold, fresh from the mines and without having served any monetary use, and to gold fresh from importation and direct from the custom house, and to all *licensed* gold. All *other* gold will be paid for at the price of $20.67, for that is the sum which corresponds and is consistent with the treatment of the monetary use of gold in contracts and obligations by the Joint Resolution, whose dollar-for-dollar provision gives in effect to such gold the same price of $20.67. In other words, and in very brief: The price of $35 applies only to gold which neither has been nor is to be put to any monetary use, and the price of $20.67 and the dollar-for-dollar provision in the Resolution apply to all gold which has been or is to be put to monetary use.

Therefore, even if the Joint Resolution does not apply, the rentals payable under the new Treasury Regulations and the Gold Reserve Act of 1934 remain at the same amount as before, that is, $20.67 an ounce. To allow the petitioner more would be to make payment of the equivalent of gold more valuable to it than payment of gold. The equivalent would then belie its own name. Or, if we

choose to regard the equivalent as if it were damages, to allow more than this would be giving the petitioner more for a breach of the obligation than it would receive by its performance, which would be absurd. On the other hand, $20.67 an ounce is the only price which is consistent with the policy and purpose of all the recent gold legislation, including the Joint Resolution.

D. Perry vs. United States * is a Binding Precedent for the Determination of the Equivalent at $20.67 an Ounce.

Perry brought suit on $10,000 Fourth Liberty Loan 4¼% bonds, which had been called on April 15, 1934, and presented for payment on May 24, 1934. That is after devaluation. Both dates were subsequent to the enactment of the Gold Reserve Act of 1934, which was passed on January 30, 1934, and subsequent also to the President's Proclamation and to the Treasury Regulations of January 30, 31, 1934. So this Act, and the Proclamation, and the Regulations had as much effect on Perry's bonds as it did on our rentals.

Perry claimed that he should be paid $1.69+ in currency for every $1 of gold coin. He computed that by taking the weight of the gold dollar fixed by the President under the authority of the Gold Reserve Act of 15 5/21 grains as compared with the dollar's previous weight of 25.8 grains. This is the same as the $35 per ounce which the petitioner here claims, as compared with the $20.67 an ounce which it has been paid, and calculated in the same way.

The Joint Resolution was held invalid as applied to Perry's government bonds. If we now assume, as, in this part of our brief, we are assuming, that the Resolution does not apply to our indentures, then the petitioner here is in the same case as Perry was there, and the rule of equivalence which the Supreme Court laid down in the

* 294 U.S. 330.

*Perry* case is authoritative in this case. For there is no difference between his gold coin and our gold on the question of determining or calculating their equivalent in money.

What this Court said there applies here. It said (294 U.S. at 357-358):

> "Plaintiff demands the 'equivalent' in currency of the gold coin promised. But 'equivalent' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could be legally used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

> "Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable."

After that statement by this Court little need be said in reply to the petitioner's argument that the provision in section 15 of the Gold Reserve Act of 1934 (R. 72) (and the similar provision in section 4 of the Regulations (R. 41)), are such a definition of the word "equivalent" as will fix its meaning in our indentures. It was this Act upon which Perry relied in his suit. It is a definition for the purposes only of the Act, and expressly so stated. It cannot determine the meaning in these indentures.

The petitioner refers to its duty of maintaining the dam, and the burden of that duty. The fact that these indentures impose on it the duty of maintaining its dam and a constant supply of water and power puts this petitioner in no different position from Perry, or from any one else who has business engagements to perform. Nor do we know how much of the petitioner's income depends on these and similar indentures. So we may ignore the argumentative fears of its counsel for its continued solvency and existence (in its Petition for Certiorari, pp. 8-9). May we say that such fears might with at least equal point be raised by the respondent, whose rents under these indentures would at once be raised by 69 cents per dollar and who is already insolvent?

The petitioner has made no attempt to show that it has suffered any loss, but it argues that it will suffer loss because the price level, going up roughly in the proportion to which

the gold content of the dollar has been reduced, will have the effect of raising the cost of its materials, wages, salaries, and taxes.

But what this Court said in the *Norman* case (294 U.S. 240, at 315) about the debtor is equally true of the creditor, as the Circuit Court of Appeals below perceived.

This Court there said:

> "The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their 'gold bonds' must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. . . . It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency."

With these words evidently in mind, the Circuit Court of Appeals declared (R. 133):

> "The petitioner can pay its taxes, workmen, for materials and interest on its obligations and all other expenses in the same currency it receives, which is

legal tender for all public or private debts. It does not have to pay out currency based on a standard unit of value containing 25.8 grains of gold and receive currency based on a unit of value containing 15 5/21 grains of gold. It receives and pays out currency based on the same standard, viz.: a gold dollar containing 15 5/21 grains of gold, nine tenths fine. Except in so far as the prices of labor and materials may have been increased by the devaluation of the dollar, it suffers no hardship. The prices of labor and materials are always subject to fluctuation without any change in the standard unit of value of the currency."

The petitioner can suffer hardship only in so far as these new dollars buy less of what the petitioner needs in materials, wages, taxes, etc.—not in so far as they buy less gold. It is not a jeweler. Gold is not its raw material.

There is no showing, no offer to prove, that the cost to the petitioner of its labor and its materials has been or will be increased. Without such a showing we are left to the assumption that all prices, including the petitioner's, go up automatically with devaluation and solely by reason of that factor.

The closest approach to any basis for that assumption is a theory which has recently received more notoriety than general approval. It is untenable. It is not a theory which has been generally accepted by economists.

"Here we are concerned only with the peculiar Warren-Pearson variant of the managed currency doctrine which holds that prices are made by a simple comparison of the commodity values of goods and of gold; we conclude that their own evidence gives strong support to the contrary position" (Charles O. Hardy, "The Warren-Pearson Price Theory," 1935, Brookings Institution, p. 34).

> "Professor Warren, true enough, seems to have labored under the impression that prices would rise by a percentage equal to that by which the price of gold was raised, although he did not take the trouble to prove either that general prices or those of international commodities would rise to that extent. But that hardly justifies the large expenditures of effort made to prove what is perfectly clear, namely, that prices of commodities in general or of special groups of commodities do not necessarily fluctuate closely with fluctuations in the buying price of gold" (S. E. Harris, "Exchange Depreciation," 1936, Harvard University Press, p. 255).

Even if we should infer that the prices of the petitioner's labor and materials will go up, that is very far from showing that the petitioner ought to get the 69 cents it here claims. To justify that claim it must show that its costs will go up 69%. To the extent of anything short of that, even the petitioner must agree that the 69 cents would be "not a recoupment of loss in any proper sense, but an unjustified enrichment," an extra 69 cents which it might properly distribute as an extra dividend.

The respondent submits that the judgment under review should be affirmed.

Respectfully submitted,

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# APPENDIX.

## The Gold for which the Treasury would Pay $35 an Ounce.

This price of $35 an ounce was offered under the authority of section 8 of the Gold Reserve Act of 1934 (R. 61), which reads as follows:

> "With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts . . . at such rates and upon such terms and conditions as he may deem most advantageous to the public interest" (R. 67).

Article VI of these Regulations (R. 56) is the one which exercises this authority to purchase gold, and prescribes what gold will be purchased. Section 42 (in this Article VI) (R. 59) sets the price of $35 an ounce (less ¼ of 1%) for the gold which the mints may purchase, which is specified in section 35* under the following four heads:

(*a*) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use;

(*b*) Unmelted scrap gold;

(*c*) Gold imported into the United States after January 30, 1934; and—

(*d*) Such other gold as may be authorized from time to time by rulings of the Secretary of the Treasury.

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* The amendment to this section which appears in the Record, on pages 55-56, is dated August 26, 1935, and is therefore subsequent to any of the dates here involved, and subsequent also to the opinion and decree below. However, it simply excludes United States gold coin from the gold which the mints may purchase, and hence is restrictive and not expansive of the price of $35.

Before examining the extent of this authority, to see whether the gold which the mints are to purchase at $35 an ounce includes gold which might have been used to pay rentals under our indentures, we must note that this section 35 is strictly limited to these four items, for it goes on to say:

> "Provided, however, that no gold shall be purchased by any mint or assay office under the provisions of this Article which, in the opinion of the mint, has been held at any time in non-compliance with the Act of March 9, 1933, any Executive Orders or Orders of the Secretary of the Treasury issued thereunder, or in non-compliance with any Regulations prescribed under such orders or licenses issued pursuant thereto, or which, in the opinion of the mint, has been acquired and held, transported, melted, or treated, or held in custody in violation of the Act or of Regulations issued thereunder, including these Regulations."

It is the gold covered by this proviso to which the Order of January 15, 1934, containing the price of $20.67, still applies (see Debtor's Exhibit A, R. 81-84). Hence the offer of $35 applies only to the four items of gold specified in this section 35 above.

To examine each of the four items separately:

(*a*) *Newly Mined Gold:*

No gold which had been used to pay our rentals, either actually or constructively for the purpose of ascertaining its equivalent, is entitled to this price of $35, because after such use it would no longer have been newly mined.

(*b*) *Unmelted Scrap Gold:*

Scrap gold is defined by section 4 of the Regulations as—

> "gold sweepings and fabricated gold . . . which is no

longer held for the use for which it was processed or manufactured" (R. 41).

By section 39 (in Article VI)—

> "No deposit of unmelted scrap gold shall be accepted unless accompanied by a properly executed affidavit on form TG-22. In addition the depositors of such gold shall establish to the satisfaction of the mint that the gold was acquired, held, and transported by them in accordance with a license issued pursuant to these regulations" (R. 58).

This is the license required by Article III (R. 47) for the purpose of acquiring and holding gold which the mint is satisfied is required for legitimate and customary use in industry, profession, or art (section 23). Therefore such gold is not available for our use, and its price of $35 is not available to determine our equivalent.

(*c*) *Imported Gold:*

Section 40 (in Article VI) limits the purchases of imported gold under this item (*c*) to—

> "only such gold imported into the United States as has been in customs custody throughout the period in which it shall have been situated within the customs limits of the continental United States, and then only subject to the following provisions:
>
> "Upon formal entry into the United States of any gold intended for sale to a mint under this article, the importer shall declare to the collector of customs at the point of entry where the gold is formally entered that the gold is entered for such sale" (R. 59).

The petitioner could not avail itself of this section on any gold which, we are assuming, has been paid to it in

Holyoke. Therefore the $35 offered for imported gold under (*c*) cannot be used to fix the price in our case.

The only remaining provision for the purchase of gold at $35 an ounce is:

> (*d*) "such other gold as may be authorized from time to time by rulings of the Secretary of the Treasury."

The Secretary has exercised this authority by five General Rulings, which appear in the Record, at pages 75-80. None of them affects our situation. So the Secretary has authorized no such purchases of gold under (*d*) as would make the price relevant to our purposes.